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No. 82-660

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

HARRISON P. CRONIC,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

# BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS AMICI CURIAE ON BEHALF OF RESPONDENT

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## QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what a reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to respondent?

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## INTEREST OF AMICI CURIAE

### National Association of Criminal Defense Lawyers (NACDL)

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia, nonprofit corporation whose membership is comprised of approximately 2,700 lawyers who are citizens of every state and reflect the diversity of state and federal criminal practice. The membership consists of trial and appellate advocates, law professors, and judges who are concerned with ensuring quality defense representation that fairly effectuates the adversary system.

### California Attorneys for Criminal Justice

The California Attorneys for Criminal Justice (CACJ) is a California statewide organization of 2,000 attorneys with substantial experience as appointed defense counsel, law professors, and law students interested in improving the quality of

defense advocacy. CACJ seeks the preservation of constitutional and legal rights of all citizens with special emphasis on the role of defense counsel in the criminal process and regularly sponsors defense advocacy training. CACJ has questioned the developing practice of countries to "auction" indigent criminal defendants to lawyer groups who submit the lowest bid with little concern for the quality of defense representation. CACJ seeks recognition that more than a license to practice law is necessary to handle a serious criminal case.

Amici's Common Concern

Unskilled practitioners conscripted by trial courts to serve as appointed counsel who have neither the requisite qualifications nor experience damage and injure the reputation of the defense bar, undermine the fairness of the proceedings that depends upon skilled, prepared, and

independent advocates to preserve the interest of the defendants, and compromise a judicial system inherently dependent upon a fully presented controversy. Experienced criminal defense lawyers are embarrassed by the unqualified attorneys who readily accept appointed criminal cases to please the court, gain trial experience, or earn the often nominal compensation.

Courtroom experience can be acquired after specialized training, and such novices should first be assigned to cases without imprisonment (i.e., infractions or regulatory offenses). The use of attorneys "off the alphabetical list" may insure random rotation of assignments but in not matching the skills of the lawyer to the complexity of the case abrogates the requirements of fundamental fairness, the Sixth Amendment, and the Criminal Justice Act of 1964 (CJA), as amended (18

U.S.C. § 3006A).[1] Too often some jurists and bar leaders complain to the public of the decline of trial advocacy, but have hesitated to address the issue in the context of a criminal appeal.[2] Congress has required the court of appeals and the district court to establish panels of qualified attorneys to accept such appointments. When derelictions are found, many are overlooked because of the burden of a retrial.

[1]H.R. 3233 introduced in Congress on which recent hearings have been held seeks to increase the CJA rates of compensation for appointed counsel in criminal cases. NACDL and CACJ support this effort, although the rate of compensation will not necessarily improve the quality of representation. "The availability of compensation and other resources can be of great significance in improving the quality of representation, but it does not guarantee it." Oaks Report on the CJA, Amendments to the CJA of 1964: Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 274 (1969).

[2]Reversal of trials because of ineffectiveness of counsel is a "bitter pill" for judges especially if such action might sully the reputation of a conscripted lawyer. See Baselon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811, 821-23 (1976); Baselon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 11, 20-30 (1973).

## SUMMARY OF THE FACTS

In February 1980, the respondent with two co-defendants was charged in a 13-count indictment with using the mails for a "scheme and artifice" to defraud by "floating" a series of insufficient checks through a series of banks in Tampa, Florida, Chicago, Illinois, and Norman and Oklahoma City, Oklahoma. The 15-page indictment alleged a series of transactions occurring from March through October 1975 and specified 45 checks in the enumerated counts charging violations of 18 U.S.C. § 1341 and § 2. The respondent was alleged to have directed the cashing of checks by co-defendant Cummings, and the amount of checks within the scheme from the period 23 June 1975 to 16 October 1975 amounted to $4,841,073.95. (Indictment)

The respondent was initially represented by attorney Arnold D. Levine who

had also represented the co-defendant Cummings as well as giving legal assistance to the corporation Skyproof Manufacturing. On 22 February 1980 at the arraignment, the "dft obj to less than 30 days before trial purs to Speedy Trial Act."[3] On 23 May 1980, jury trial was set for 16 June 1980.[4]

On 5 June 1980, Mr. Levine, because of the patent conflict of interest, moved to withdraw, and on 19 June 1980 the motion was granted and Chris Colston was appointed defense counsel under the CJA. (R.T. 14)[5] Respondent objected:

> One is I don't feel like that I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five-year investigation, all the documentations, a complete review of all that prior to my

[3]Docket Entries, p. 1.

[4]Docket Entries, p. 2.

[5]The Reporter's Transcript of the proceedings on 19 June 1980 (Volume VII) is referred to as "R.T."

testimony before a federal grand jury in Tampa. (R.T. 15)

The court expressed its concern for adhering to its trial date of 30 June and acknowledged that he was unacquainted with counsel appointed "off the alphabetical list" (R.T. 18), but that appointed counsel[6] on behalf of his client, expressly requested a minimum 30-day continuance (R.T. 19). Attorney Levine, a former federal prosecutor, explained the need for a minimum 30-day defense preparation:

> If I may be of some assistance to the Court, since I have been in the case for a good while and Counsel's just coming in, the documentation that the government has and has made available for examination, literally speaking, is at least a foot and a half high if not two feet high, that is the government's documentation in this case. And Counsel for Mr. Cronic has not as yet had an opportunity to see it no less digest it. It constitutes hundreds and hundreds of checks and thousands of entries and some of the witnesses in the matter are witnesses from Florida, from the Tampa community and some witnesses are local here.

[6]All references are to Mr. Colston.

> I would respectfully submit to your Honor that if counsel for Mr. Cronic were to devote all of his working days, he might be able to be ready in thirty days, might be, if he were to devote all of his time just to this case. (R.T. 18)

The court denied the requested continuance and set the trial date for 14 July 1980 (R.T. 19).

Appointed counsel inquired of the court of hiring "an investigative assistant" (R.T. 21) and "my most pressing assistance needed right now would be of an accountant." (R.T. 22) The court stated that it would not hesitate to grant the request but added:

> Unfortunately, as you may not know, Mr. Levine likely does, $300 is the most we can pay and that doesn't get much accounting but it is better than none, I guess.

(R.T. 22) The record does not reflect that appointed counsel obtained the services of an investigative assistant or

accountant.[7] The respondent questioned the appointment of counsel because of his specialty as real estate law and that he had only one federal criminal case in his entire legal experience, the court interpreted the objection as the right to select one's own lawyer and denied the objection of the respondent to his appointed attorney's qualifications. (R.T. 23).

On 19 June 1980, the trial judge appointed Ryland L. Rivas as an "investigator"[8] to interview witnesses and examine

[7]No CJA Form 21 (request for non-attorney services) was filed other than for Ryland L. Rivas, as "investigator" and for the court reporter's transcript. Judical notice is requested for the three CJA vouchers filed in the district court file which are Appendix A to this brief. Fed. R. Evid. 201(f).

[8]Guidelines for the Administration of the Criminal Justice Act, § 2.11 generally prohibits compensation of more than one counsel unless it is an extremely difficult case and the court makes a finding it is in the interest of justice. No such finding was made, and the record contains no explanation for the subterfuge other than to "end run" the requirements of the CJA.

documents. The rate of compensation on the work performed is not listed, but a claim for $300 was approved.

The Trial

The four-day jury commenced on 14 July 1980. Attorney Ryland L. Rivas was present to assist Colston. The government presented 18 witnesses and 125 exhibits; the defense presented 7 exhibits but no defense. The government outlined a "check kiting scheme" in 1975 involving a series of transactions of over $5 million in insufficient checks. In the defense opening, appointed counsel stated "the government's alleged a conspiracy between three defendants. They say this conspiracy was to defraud banks." (J.T. 87)[9] (emphasis added). After promising to prove that the client would be able to cover the overdrafts, the greed or incom-

[9]The transcript of the jury trial is referred to as "J.T." Counsel in his opening twice again refers to "conspiracy." (J.T. 91)

petence of the Norman Bank of Commerce, and Skyproof's "shambles of a record system," he additionally outlined that the proof would show that the defendant had no connection with the ownership of Skyproof, did not assign or control the bank accounts, and did not control Ms. Cummings. (J.T. 87-89) Counsel concluded:

> I appreciate your attention. I apologize if I had to read from notes, but this is my first trial and I hope you will just bear with me.

(J.T. 92)

Throughout the trial defense counsel made nine perfunctory objections (J.T. 100 (best evidence), 114 (foundation), 137 (not seen documents), 190 (non-responsive), 194 (non-responsive), 348 (knowledge), 376 (anticipated objection), 378 (handwriting identification), and 436 (purported loss)). Attorney Rivas objected to the introduction of worksheets

but not their use or marking for identification (J.T. 302). Later he commented "Excuse me, Your Honor, our witnesses are coming in." (J.T. 463) Finally, Mr. Rivas acknowledged receipt of a government requested instruction not given (J.T. 599).

On appointed counsel's third objection to Government Exhibit 1-A,B,C, appointed counsel stated, "Yes, Your Honor, we would object because we have no idea what is to be in these." The prosecutor responded, "We made those available to everyone . . . ." (J.T. 137) Appointed counsel asked co-defendant Merritt who was testifying for the government, "The government has alleged a conspiracy in this case, has it not?" When the witness was not sure, counsel asked, "Have you ever been furnished a copy of the indictment?" Merritt, the non-attorney, answered, "Yes, sir, I have, but I do

not recall the words or term conspiracy." (J.T. 426) Shortly thereafter, the judge admonished the jury as to appointed counsel's misunderstanding of the charge for the court stated, "Just one thing. Inadvertently counsel referred to conspiracy. The offense charged is not a true conspiracy, it's close kinfolks to it, but, it is alleged that a scheme and artifice to defraud was in existence and the mails were used in carrying it out. (J.T. 430)

The government's last witness was the Postal Service accountant who put the case together for the government with charts, use of losses, and the checks used for personal expenses of the respondent and the co-defendant Cummings. (J.T. 557-566) There was no cross-examination, and the government rested. (J.T. 566) On the following morning after an off-the-record chambers conference, the court announced

that the defendant had made a motion to dismiss the indictment "on the failure of proof," and the defense rested and did not call any witnesses. (J.T. 567)

Appointed counsel's closing argument was brief. (J.T. 581-590) During closing he stated, "Now, in the indictment, the government has alleged a scheme. When I got into this case three or four weeks ago, I did not think there was any scheme whatsoever. Now I do." (J.T. 582) "I agree there's some scheme there." (J.T. 583)

The defendant was found guilty on eleven of the thirteen counts[10] and was later sentenced to 25 years imprisonment.

Appointed counsel submitted a CJA Form 20 for compensation and reimbursement and was awarded by the court $1,097.60 (see Appendix A-1). Counsel detailed his

[10]The two counts on which the defendant was found not guilty related to the checks of the co-defendant Merritt who was given immunity.

hours for services. He had spent 39.8 hours in-court time (withdrawal hearing 3.2, trial 32, and sentencing 1.6) and 92.6 hours out-of-court. Appointed counsel spent only 29.6 hours obtaining and reviewing records and 45 hours interviewing witnesses. On "restitution negotiations" counsel spent 12.5 hours and 5.5 hours perfecting the appeal.[11] Counsel never obtained any investigative services other than Mr. Rivas or the "pressing" accounting assistance. (R.T. 22)

## ARGUMENT

### THE STANDARD USED BY THE COURT OF APPEALS TO MEASURE THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED UNDER THE SIXTH AMENDMENT WAS REASONABLE AND PROPER IN THE CONTEXT OF THIS CASE.

The test of the Tenth Circuit in determining inadequacy of representation

[11]The CJA form appears to be an accurate total of all of appointed counsel's services, for the time spent would have entitled him to compensation to $3,046 if the district judge and the chief judge of the circuit would have waived the $1,000 statutory limit. 18 U.S.C. § 3006A(d)(3). The form reflects the hours counsel would not get paid for.

without the proof of specific prejudice includes "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." United States v. Cronic, 675 F.2d 1126, 1129 (10th Cir. 1982). That standard applied to this case fairly implements the right to counsel granted by the Sixth Amendment and the CJA.

Defense counsel may make tactical missteps and errors of judgment, and in some cases they may be harmless beyond a reasonable doubt. Error of counsel is not always incompetency. That counsel does exercise judgment should not insulate from review his or her qualifications and performance. In fact, much of the most important work of counsel outside the courtroom is seldom within the four

corners of the record, and by insisting upon higher standards for counsel this Court would materially decrease the post-conviction hearings on the performance of admittedly substandard lawyers. Harmless error should not be made a shield for the inadequate lawyer.

In this case, the Court has a two-part analysis: (1) qualifications of appointed counsel and (2) his preparation and trial performance. Then adequacy of counsel is measured first against the CJA, a statute, then against the Sixth Amendment right to counsel. Whether qualifications or performance, against the CJA or the Sixth Amendment, counsel's performance fell below the bar's reasonably trained and experienced criminal defense advocate in this multiple fraud case.

The Tenth Circuit standard enumerates criteria that must be adapted to individual cases, and relief is limited only to

the most egregious cases. The enumeration first of minimum qualifications and then performance standards is difficult, but this real estate lawyer without criminal law experience or even a jury trial should not have been appointed in a complex mail fraud. In its constitutional role this Court should be slow to issue "black letter" standards about what this Court believes is the reasonably experienced criminal defense lawyer, but the standards should be announced that do not tacitly encourage less than marginal performance because good defense lawyers will not take these cases.

Justice Erickson, an experienced appellate jurist with an understanding of the realities of trial practice, especially criminal trial practice, urges the use of the American Bar Association Standards Relating to the Defense

Function.[12] In this case, appointed counsel, principally due to inexperience, transgressed several of the standards: 3.1, Lawyer-Client Relationship;[13] 3.2, Interview Client;[14] 3.6, Prompt Action;[15] 3.8, Keeping the Client Informed; 3.9, Same Duty as For Retained Client;[16] 4.1,

[12]Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim. L. Rev. 233 (1979).

[13]"Defense counsel should seek to establish a relationship of trust and confidence with the accused." In Morris v. Slappy, 103 S. Ct. 1610 (1983), the Court questioned the right of the defendant to a "meaningful relationship" with appointed counsel, but it is understood that the attorney still has the minimum obigation to seek to establish trust and confidence on a professional rather than personal basis.

[14]The inconsistent actions taken during trial does not indicate substantial client contact which may have been influenced by the distance between the defendant who lived in Florida and appointed counsel who was in Oklahoma.

[15]In July 1980, counsel was appointed less than a month before trial but the offenses allegedly occurred in 1975.

[16]The trial court placed too much emphasis on the public obligation of appointed counsel to accept the duty (to the court) rather than the individual relationship to the client the same as if that client had retained the appointed attorney. Cf. Farri v. Ackermann, 444 U.S. 193 (1979).

Duty to Investigate;[17] 4.3, Relationship with Prospective Witnesses;[18] 4.4, Relationship with Expert Witnesses;[19] 4.5, Good Faith Use of Discovery;[20] 5.1, Advising the Client and the Duty of a Candid Evaluation;[21] 6.1, Duty to Explore

[17]Attorney Levine revealed the impossible task of preparation given the government's extended investigation, and his substantial experience as a federal criminal law practitioner was probably conservative for a person without trial or criminal law experience. "Investigator Ryland" should not be considered an investigator.

[18]The failure to call any witnesses in light of the opening statement is suspect. The appointed "investigator's" remark that witnesses were coming was either a misunderstanding or misstatement.

[19]The failure to obtain either an investigative assistant or an accountant, even though misleading advice was provided by the trial judge on the availability of experts under the Criminal Justice Act, see infra.

[20]Although the prosecution apparently made the voluminous discovery available, counsel had not yet mastered it.

[21]One of the most difficult duties for defense counsel is to provide the client with a candid view of the government's charges and evidence, as well as an opinion as to the outcome of the litigation, even if the client might not agree. This candid and professional evaluation depends upon the mastery of the materials in the case as well as the experience of counsel in understanding the probable outcome in light of similar cases.

Disposition without Trial.[22]

No single formula will evaluate competency. In this case, the lack of time to effectively prepare was paramount to the determination that counsel's services would not be effective.[23] Outstanding counsel without adequate investigation and preparation would be ineffective--though not incompetent. On the other hand, counsel without substantial knowledge of the criminal law, especially federal criminal law when before a federal court, might still provide ineffective assistance no matter how much preparation.

The standard for the effective assistance of counsel could vary from an

[22]Although such action can only be taken with the client's consent, if there is adequate time prior to trial and counsel has sufficient mastery of the case, the exploration and consideration of a disposition is essential to provide effective assistance of counsel. Both co-defendants so resolved their charges.

[23]Old trial lawyers agonizingly repeat that the most essential element of good advocacy is complete and thorough preparation. The five "P's" are: Prior Preparation Prevents Poor Performance.

ever increasing detailed checklist or a more convenient but ambiguous generalized standard: "the skill, judgment and diligence of a reasonably competent defense attorney." Before performance is reviewed the court must evaluate the qualifications of counsel against some minimum standard. Something more than a license to practice is necessary for a case where the client will probably be imprisoned. This Court need not fashion a "bright line" standard other than to acknowledge that counsel without jury trial experience or federal criminal law experience did not satisfy the minimum standard.

Before appointed counsel served in a federal felony criminal case counsel could be expected to undergo training and participate in two or more criminal jury trials or equivalent experiences.[24] The Judicial

[24]This requirement for panel attorneys now exists in the Southern District of California.

Conference's Devitt-King Committee Reports have initiated experiments with general proposed standards of admission to federal courts,[25] but anomalously the federal courts have failed to adopt standards for CJA panel attorneys. Much as a trial court has a responsibility to inquire as to the mental responsibility of an accused to stand trial,[26] the trial court must make a minimum inquiry into the skill, qualification, ability, training and experience of those who serve as appointed counsel in felony cases.

[25]Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 Fordham L. Rev. 1 (1980). A former federal district judge stated, "If advocates are meaningfully incompetent, how can we leave their clients in jail? If the incompetence is not sufficient to invalidate judgments, how large a concern is it? If we are not being hypocritical in allowing the convictions to stand, are we distorting when we charge that lawyers bumble on a large scale?" Frankel, Curing Lawyers' Incompetence: Primun Non Nocere, 10 Creighton L. Rev. 613, 620 (1977).

[26]Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975).

In some federal districts, there is a practice of requiring counsel to work first on petty offenses or misdemeanors, or as counsel appointed for material witnesses, then later an appointment in a "low yield" felony (anticipated incarceration would not exceed one year in most cases).[27] Although an accused may not have a right to select counsel,[28] the court has a duty to insure that the skill and experience of counsel matches the case. The Tenth Circuit correctly

[27]The Northern District of Illinois, a pilot district under the King plan, has an excellent training program for CJA panel attorneys supervised by the Federal Defender Terence F. MacCarthy and is described in the Amendments to CJA of 1964: Hearings on S. 1461 before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 121-27 (1969) (statement of Federal Defender MacCarthy).

[28]If possible the client should be given some limited choice of counsel. For example, the client might be permitted to request a different attorney from the same defender office or be given a choice between a federal defender and a CJA panel attorney. The problem now before the Court might have been avoided if another CJA panel lawyer had been selected.

assessed adequacy of counsel in the threshold question of minimum qualifications: "(2) the experience of counsel; (3) the gravity of the charge; [and] (4) the complexity of possible defenses."

Additionally, the Tenth Circuit's standard implements Powell v. Alabama's[29] requirement of adequate preparation and investigation. The Tenth Circuit's criteria: "(1) the time afforded for investigation and preparation; and (5) the accessibility of witnesses to counsel," dealt with the opportunity to prepare. This complex mail fraud case with volumes of discovery that an experienced defense lawyer would require full-time one month to study, analyze, verify, organize, critique, and synthesize, was brought to

[29]287 U.S. 45 (1932).

trial within 24 days.[30] This scheduling of the trial could only telegraph to the traumatized tyro that such performance of counsel would be perfunctory or at least a learning experience. Appointed counsel had difficulty understanding the difference between a "scheme and fraud" and a conspiracy for which the judge had to correct as an "inadvertence." The government's four-and-a-half year time of preparation literally bowled over the inexperienced defense counsel at trial.[31] The defense asked for an investigative assistant and accountant, but never

[30]The court of appeals referred to 25 days to prepare. 675 P.2d 1126, 1129. Appointed counsel took over on the day retained counsel was allowed to withdraw (19 June 1980), and trial started on 14 July 1980. More accurately, appointed counsel had less than 24 days to prepare. Cf. Fed. R. Crim. P. 45(a).

[31]Defendant's "kind words" about defense counsel's performance (J.T. 568) are probably deference to the court who appointed such inexperienced counsel and could not rationally be treated as a "knowing and intelligent" waiver of competent counsel. Cf. Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962).

followed up on this initial request. The government's case turned on accounting practices, the "float" between banks, and the processing of these checks and their relationship to Skyproof. Counsel was in need of expert financial assistance on bank procedures, accounting practice, check routing and cashing, and value assessments of the companies' worth to at least evaluate the evidence and formulate some consistent theory of defense. The use of the mails jurisdictional nexus was not properly challenged, and the evidence concerning the banking practices, the loans, and the operation of Skyproof never fairly developed or challenged the evidence of loss or the difficult issue of mens rea for this offense.

The failure to present any defense whatsoever reflects the unsettled closing argument where counsel conceded the existence of the scheme to defraud. That

Ms. Cummings was her own person and not subject to the direction of the respondent was never established by any defense evidence. No evidence was offered on the true value of the bottling company that was sold for the indebtedness created by the checks. No evidence was offered to show that the checks were expended for the benefit of Skyproof. In light of the professionally and carefully marshalled evidence of a skilled and experienced prosecutor, the defense collapsed. The failure to live up to promises made in the opening statement was disastrous. In addition to a review of the government's discovery, independent investigation would have had to be done to size up the credibility of the witnesses, the strength and weaknesses of their expected testimony, and their weaknesses to cross-examination. If possible, a professional assessment should have been done to integrate the

facts into some arguable challenge to the voluminous detail of the government's case.

Goliath's triumph was an empty victory for the fairness of the adversary system. The court of appeals accurately observed: "Nevertheless, Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on." 675 F.2d 1126, 1129.

In Powell v. Alabama, the defendants were indicted six days after the alleged rape, and six days later they went to trial. The factual dispute, although greatly contested, turned on the reportedly recent observations of the witnesses to a one-time occurrence--a factual dispute that would depend upon the credibility of the two alleged victims. The state trial court in Powell had originally appointed all members of the bar but later allowed a Tennessee lawyer named Mr.

Roddy who was appearing without compensation on behalf of the defendants. The Hon. Milo Moody, "an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases," 287 U.S. 45, 75, assisted Mr. Roddy and was willing to go ahead and help him in anything he could do. Mr. Rivas' role is akin to that of Mr. Moody. Mr. Rivas' minimal and secondary participation does not cure the ineffectiveness of principal counsel.[32]

This Court in Powell found the designation of associate counsel to be both indefinite and so close upon trial so

[32]Mr. Rivas indicates some criminal experience but it is not known whether it is in the federal court and his role in this trial was extremely attenuated. "Standby counsel" is provided in some cases where the defendant acts as his own lawyer but was not intended to include cases where counsel had already been appointed. The use of counsel as "second chair," thoroughly briefed on the facts, law, and tactics of the case, is an excellent practice for the qualified tyro who takes his or her first steps in minor litigation.

as to be pro forma.[33] This was not substantial and effective legal assistance. This Court noted the need for an opportunity to prepare:

> In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

287 U.S. 45, 57.

In Avery v. State of Alabama, 308 U.S. 444, 446 (1940), this Court reiterated the need for preparation by defense counsel to implement the Sixth Amendment:

> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal com-

[33]The dissent of Justice Butler challenged that participation of the Hon. Milo Moody was pro forma. 287 U.S. 45, 74-75.

> pliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

In Chambers v. Maroney, 399 U.S. 42 (1970), the petitioner had been denied a hearing in a habeas corpus proceeding which challenged the effective assistance of counsel. The defendant's first trial in that case ended in a mistrial, and prior to the commencement of the second trial the defendant was represented by a different attorney from the same defender office. No charge was made that the second attorney was either incompetent or inexperienced. This Court exhorted state courts to make every effort to effect early appointments of counsel in all cases, but was not inclined to reverse because of a tardy appointment of counsel. Whether or not the appointment was shown to be tardy when there was a "preview"

with the first trial in which counsel of the same defender office provided representation is not analogous to an inexperienced lawyer faced with a strange and complex criminal case. Similarly, Morris v. Slappy, 103 S. Ct. 1610 (1983), may be distinguished because the second deputy public defender was experienced, prepared, and maintained the continuity of the defense. The first public defender was absent and unavailable through sickness, and the replacement counsel who had sufficient time to prepare for trial made no request for a continuance. In this case, the respondent not only objected to inexperienced or unqualified counsel, but appointed counsel expressly requested a minimum of a 30-day continuance which was pressed more assiduously with greater explanation by former retained counsel who was familiar with the case and had filed extensive motions. The request for more

time by defense counsel distinguishes both Chambers and Morris.

United States v. Morrison, 449 U.S. 361 (1981), is an anomaly. It is not valid precedent for the rule that inexperienced or unprepared defense counsel's lack of preparation and nonperformance in a serious federal felony can be characterized a "judgment call" that may be treated as harmless error. Two DEA agents suggested that an accused represented by retained counsel ($200 retainer) could get better representation by the public defender and indicated the value of cooperation and avoidance of jail. She rejected their overtures, and the defense contended that the quality or effectiveness of representation had been prejudiced. The district court had dismissed the indictment because of the egregious behavior of the agents. This Court reversed absent demonstrable prejudice or

substantial threat thereof, for dismissal of the indictment was inappropriate. The Court did note that remedies should be tailored to the injury suffered, and reversal is appropriate where there has been ineffective counsel. The Court cited Powell v. Alabama, as an example of relief where "judicial action before or during trial prevented by counsel from being fully effective." 449 U.S. 361, 364.

When a conflict has been demonstrated, this Court will reverse without a showing of prejudice. Glasser v. United States, 315 U.S. 60, 76 (1942);[34] Holloway

[34]"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

v. Arkansas, 435 U.S. 475, 491 (1978).[35]

In determining the relief to grant, Geders v. United States, 425 U.S. 80 (1976), offers guidance. There, this Court reversed a federal conviction as the result of a ten-day trial because the trial court precluded counsel from consulting his client the defendant during a seventeen-hour overnight recess. Although the trial judge had a right to control his courtroom (as well as his calendar), "convenience occasionally must yield to concern for the integrity of the trial

[35] "Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." In Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court held that the "mere possibility" of a conflict of interest did not warrant the conclusion that the defendant was deprived of his right to counsel. The Court also noted "our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment . . . . Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." 446 U.S. 335, 344.

itself." 425 U.S. 80, 91.

When the court appoints inexperienced counsel for a complex and multi-incident mail fraud case and forces the case to trial in which even an experienced counsel would be unable to prepare, prejudice need not be shown. The "unguided speculation" of calling the error harmless would negate the existence of the right.

THE DISTRICT COURT FORCING THE DEFENDANT TO TRIAL OVER DEFENSE COUNSEL'S REQUEST FOR A THIRTY-DAY CONTINUANCE VIOLATED THE SPEEDY TRIAL ACT (18 U.S.C. § 3161(c)(2))

In 1979 Congress was unequivocal in establishing the minimum defense preparation time necessary in a federal criminal case. This minimum "safety valve" was established to offset the hydraulic pressures of moving cases announced with the adoption of the Speedy Trial Act (18

U.S.C. §§ 3161, et seq.).[36] Section 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

In United States v. Mers, 701 F.2d 1321, 1332-33 (11th Cir. 1983), the court held:

> The legislative history leaves no doubt that the purpose behind subsection (c)(2) was to prevent the trial from being held so quickly that a defendant would not have time to prepare. Section 3162(c)(2) was added to the statute at the behest of the Justice Department, the Judicial Conference and the American Bar Association.

For the Department of Justice, Attorney General Griffin B. Bell, in a letter dated 10 April 1979 to the Vice President stated:

[36] Although the sanction provisions of 18 U.S.C. § 3162 were delayed until 1 July 1980 (18 U.S.C. § 3163) the other provisions including section 3161(c)(2) became effective 2 Aug. 1979. Speedy Trial Act Amendments of 1979, Pub. L. 96-43, 93 Stat. 327 (2 Aug. 1979).

> Second, the trial cannot be scheduled sooner than 30 days after the filing of an information or indictment, without the consent of the defendant, thus assuring sufficient time for the selection of counsel of choice and preparation of defenses.[37]

The position of the Judicial Conference of the United States was articulated by William E. Foley, Director, Administrative Office of the U.S. Courts, to Senator Kennedy, Chairman, Committee on the Judiciary, in his letter dated 20 April 1979:

> Second, it would add a new provision that a defendant may not be compelled to go to trial in less than thirty days from the beginning date from this time limit (indictment or initial appearance in the district, whichever comes later).[38]

The American Bar Association's position was reviewed during these Congressional hearings, and the ABA concurred with the Department of Justice:

[37] The Speedy Trial Amendments of 1979: Hearings Before the Senate Committee on the Judiciary on S. 961 and 1028, 96 Cong. 1st Sess. 729 (1979).

[38] Ibid. at 733.

> It is recommended that the Speedy Trial Act be amended to provide that the trial of a defendant shall not commence within 30 days of the filing of indictment or information without the defendant's consent. The Department of Justice bill includes that recommendation. The restriction on the minimum time that a judge will allow a defendant to prepare is of particular importance when the defendant was not arrested or charged before the indictment. With the increasing emphasis by federal law enforcement agencies on white collar crime this is of growing importance. It also serves to protect a defendant's right to choose counsel of the defense choosing by giving minimal opportunity to retained counsel and prepare for trial.[39]

Retained counsel Arnold Levine, who initially represented the defendant and the co-defendant, had a patent conflict of interest as well as the potential for being called as a witness at trial. The district court only after an evidentiary hearing permitted him to withdraw on 19 June 1980 at which time the court appointed counsel for the respondent who had demonstrated he was financially unable

[39] Ibid. at 492.

to retain counsel. Since representation by Mr. Levine with a patent conflict of interest was a nullity under established precedent of this Court, Glasser v. United States, 315 U.S. 60 (1942), and Holloway v. Arkansas, 435 U.S. 475 (1978), the defendant had not truly appeared "through counsel." Mr. Levine's representation of the co-defendant Cummings who ultimately cooperated as a witness for the government (J.T. 470) indicates an antagonistic role to the best interest of the defendant. The dispute over payment of attorney's fees exacerbated the conflict, so that it would be unfair to charge the preparation time of this attorney to the inexperienced substitute.[40] When the court appointed counsel, it gave him less than the statutory mandated 30-day period in which to

[40] In United States v. Daly, Nos. 81-1654, etc., (9th Cir. 4 October 1983), the court recognized that a limited or special appearance of other counsel is not chargeable to this minimum 30-day defense preparation period.

prepare. This contravention of the Congressionally mandated minimum standard supports the reversal granted by the court of appeals.

Through intuition or common sense recognition of the need for a minimum preparation period, Mr. Levine because of the voluminous discovery and lengthy government investigation as well as the trial of a case in which the trail had grown stale for four and a half years, sua sponte requested a minimum 30-day period for newly appointed counsel to prepare for trial. Reference to this ten-month-old statutory right was not referred to by appointed counsel or the court, even though newly appointed counsel did make the request for a 30-day continuance.[41] Skilled, experienced, or reasonably competent counsel would have apprised the

[41] Skilled defense counsel had early alerted the trial court to the recently adopted 30-day defense preparation period. See Docket Entries (2-22-80).

court of the statutory mandate that should have permitted at a minimum the 30 days in which to prepare. Failure to articulate the important statutory right to prepare was a serious dereliction.

THE SERIOUS MISINTERPRETATION OFTHE CRIMINAL JUSTICE ACT BY THE DISTRICT COURT IN PROVIDING APPOINTED COUNSEL AND EXPERT ASSISTANCE REQUIRED A NEW TRIAL.

Purpose of the CJA

In 1963 the ad hoc appointment of attorneys to represent those charged with serious crime was considered an obligation of the bar rendered without compensation or reimbursement. Although courts did appoint counsel, the role of the defense counsel was less than satisfactory. The importance of defense counsel was recognized by the Allen Report which stated:

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative

> questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. . . . It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity.[42]

In reviewing the role of appointed counsel under the Criminal Justice Act, this Court in Ferri v. Ackerman, 444 U.S. 193 (1979), stated:

> [T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibili-

[42]Allen, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 11 (1963).

> ties is the ability to act independently of the Government and to oppose it in adversary litigation.[43]

Counsel not Properly Selected by the District Court under the CJA

The district court, having no prior knowledge of counsel appointed to serve, selected counsel from "an alphabetical listing." The CJA requires that attorneys serving on a panel for CJA appointments "be selected from a panel of attorneys designated or approved by the court . . . 18 U.S.C. § 3006A(b). The court has a Congressionally designated responsibility to ensure minimum compliance with the CJA requirements of adequacy of counsel in a federal criminal case. This judicial responsibility cannot be neglected by leaving appointments up to inexperienced attorneys selected at random by a "wheel of fortune" (alphabetical listing). The use of

[43]Cited in Polk Co. v. Dodson, 102 S. Ct. 445, 450 n.8 (1981).

inexperienced tyros on major federal criminal litigation is inconsistent with the CJA, and the court of appeals was proper in exercising this Congressionally created supervisory role over the district court in its failure to maintain minimum compliance with the letter and spirit of the CJA.[44]

Judicial Misadvice as to the Availability of Experts

Inexperienced counsel's most "pressing" need was that of an accountant (R.T. 22). The district court advised the defense neophyte that under the CJA "$300 is the most we can pay and that doesn't get much accounting but it is better than none, I guess." Since the appointed defense lawyer

[44]Attached as Appendix B is a letter to the trial judge seeking certification of extracts of the district plan and number of attorneys serving on the panel in 1980 for the Western District of Oklahoma. No response has been received at the time this brief has been submitted, but if a response is filed, the Court is requested to treat it as a supplement to the record (Fed. R. App. P. 10(e)) or take judicial notice of it (Fed. R. Evid. 201(f)).

did not have criminal law experience and had to defer to the wisdom of the court for an interpretation of the Criminal Justice Act, this advice contradicted the provision that would have allowed an expert in excess of $300 with prior approval of the district court judge as well as the chief judge of the circuit. 18 U.S.C. § 3006A(e)(3).[45]

No further request for any accounting services was made, and it is difficult to calculate the impact of the lack of such an essential expert in a case that turned upon the characterization of the "floating" of checks in the financial artifice or scheme alleged by the government in thirteen counts.

Defective "Investigative" Services

The district court appointed Ryland Rivas as a "investigator," but the district

[45] See also VII Guide to Judiciary Policies and Procedures, Guidelines for the Administration of the Criminal Justice Act, § 3.02.

court may have been unfamiliar with his role because the district court did not know his name at start of trial. (J.T. 2). The government contends that this "investigator" was in fact supervisory counsel, but the CJA Form 21[46] revealed that his total claim was for $300. Since appointed defense counsel on the CJA Form 20 indicated 32 hours, it would appear that investigator Ryland L. Rivas received less than $10 an hour for his in-courtroom assistance. Although there was a representation that some assistance was provided prior to trial, the CJA Form does not indicate the hours of services provided for this attorney.[47]

Given the nature of the claim for services, the lack of detail, and the amount

[46]Not the CJA Form 20 used for attorney services.

[47]Although as an investigator under the judge's misinterpretation as to the $300 absolute maximum for expert or other services under the CJA, this amount may have been submitted, but unlike appointed counsel Colston there was no listing of hours even though there was a cutoff for the statutory maximum.

requested, it is difficult to sustain the view that this attorney exercised the control, direction, and management of the case. The characterization of Mr. Rivas as an "investigator" forecloses the government from now changing his role to legal architect and director of the trial. The record does not substantiate that type of participation. It might have been a different case if Mr. Rivas was appointed by the court and Mr. Colston was named as "investigator."

The Court of Appeals has a Supervisory Role Over the Administration of the CJA

To ensure professional independence for the defense advocate, Congress struggled for a mechanism or a device to insulate appointed defense counsel from governmental pressures. The device chosen was the use of the Judicial Conference of the United States which would establish rules and regulations

for the governing of plans formulated initially in the district court but approved and reviewed by the circuit judicial council. 18 U.S.C. § 3006A(a) and (i). The Judicial Council of the Circuit has the right to supplement the district court plan prior to approval and the right to modify it at any time. Congress intended that the district court judges be kept at length from the operation of the defense service, but allowed for differences within the different circuits. The implementation of a district court plan by the Tenth Circuit is a matter uniquely within the scope and authority of the Tenth Circuit which should be given greater latitude in interpreting the requirements of the Criminal Justice Act in light of the demonstrated Congressional

intent.[48]

As to an interpretation of the Sixth Amendment, this Court has ultimate say. In the spirit of allowing experimental flexibility within the circuits, deference should be paid to the circuits' implementation and enforcement of the CJA in their own districts. The action of the court in this case was necessary to effectuate the Congressional policies of the CJA.

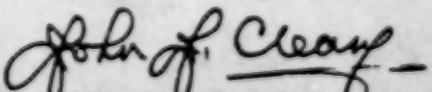
CONCLUSION

Although the appointed attorney admirably responded to the "call of duty," the representation provided by one so

[48]The Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 53 (2 Apr. 82), substituted "court of appeals" for "judicial council" in the supervisory authority of the federal public defender as well as the body making reports to the Judicial Conference of the United States. This change balanced the addition of district judges to the circuit judicial councils, but in principle Congress gave the supervisory control to the reviewing courts rather than the district court which might exercise undue control over the defense advocate and compromise professional independence.

untrained and inexperienced in federal criminal law was at worst a sham, at best a professional disgrace. If ours is an adversary system, then those who serve as appointed counsel should have some minimum qualifications and an adequate opportunity to prepare. Both were absent in this case. To now look for "prejudice" is to say that the Sixth Amendment and CJA right to counsel mean no more than a "warm body," for appellate courts with hindsight clarity will characterize the defense as a "low visibility" strategy. The Court's tolerance of this low level advocacy will only increase its use. The Court should now speak to the need for quality representation in a serious federal criminal case.

Respectfully submitted,



November 1983 JOHN J. CLEARY
California Attorneys for
Criminal Justice

Attorney for Amici Curiae

IN UNITED STATES ☐ MAGISTRATE ☒ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: United States v. Cronic

AT: Western District of Oklahoma, Oklahoma City, Oklahoma

LOCATION NUMBER: 16605

PROCEEDING (Describe briefly): All proceedings.

CHARGE/OFFENSE (Describe if applicable & check box): Mail fraud (13 counts) — U.S. or other code citation: 18:1341; 2 — ☒ Felony ☐ Misdemeanor

1 ☒ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness

DOCKETED

DOCKET NUMBERS: Magistrate; District Court: CR-80-21-E; Court of Appeals

VOUCHER NUMBER: 162965

PERSON REPRESENTED (Show full name & check box): Harrison F. Cronic — Name already appears as ☐ 1 or as ☒ 2 above

## COURT ORDER

☒ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR (Name of prior counsel) (Date appointed)

Because the above named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization named below

Chris E. Colston

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form subject to applicable law, administrative regulations and the plan of the court.

Signature of U.S. Judge/Magistrate

BY ORDER OF THE COURT

(Clerk or Deputy)

## FOR SERVICES & EXPENSES VOUCHERED BELOW

| * TIME SPENT | DATES | HOURS | AMOUNT |
|---|---|---|---|
| I IN OPEN COURT | | | |
| A ARRAIGNMENT &/OR PLEA | | | |
| B MOTIONS & REQUESTS | [illegible] | [illegible] | |
| C BAIL HEARINGS | | | |
| D SENTENCE HEARINGS | [illegible] | [illegible] | |
| E TRIAL | [illegible] | [illegible] | |
| F REVOCATION HEARING | | | |
| G APPEALS COURT | | | |
| H OTHER (Specify below) | [illegible] | [illegible] | |
| TOTAL "IN COURT" HOURS | | 30.0 | $ 1194 |
| II OUT OF COURT | | | |
| A INTERVIEWS & CONFERENCES | [illegible] | 45.0 | |
| B OBTAINING & REVIEWING RECORDS | [illegible] | 32.7 | |
| C LEGAL RESEARCH & DRAFTING | [illegible] | 15.5 | |
| D INVESTIGATIVE & OTHER WORK (Specify) | | | |
| Perfect Appeal to 10th Circuit | [illegible] | 5.2 | |
| E TRAVEL TIME (during normal office hours only) | | | |
| (1) TO & FROM COURT (round trip not under 1 hr. not allowed) | | | |
| (2) OTHER TRAVEL TIME (Specify) | | | |
| TOTAL "OUT OF COURT" HOURS | | 98.4 | $ 1992 |
| TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME | | | $ 1800 |

RATE PER HR: $ 30 / $ 20 — HOURS TIMES RATE

III ITEMIZED EXPENSES (Specify on continuation sheet)

| | AMT. PER ITEM |
|---|---|
| Long distance telephone calls (see attached for itemized statement) | $ 97.60 |
| TOTAL ITEMIZED EXPENSES | $ 97.60 |
| TOTAL COMPENSATION & EXPENSES | $ 1,797. |
| DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE | 0 |
| NET AMOUNT CLAIMED | $ 1,797. |

* If more space is needed use additional sheets

## CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ YES ☒ NO

If "YES", how much were you paid? $

By whom were you paid?

In this or another case did you represent this person in court? ☐ YES ☐ NO

SIGNATURE OF ATTORNEY/PAYEE (SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS): [signature] DATE: 7-1-81

AMOUNT CERTIFIED/APPROVED: $

APPROVED FOR PAYMENT — SIGNATURE OF JUDGE/MAGISTRATE: DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS (Payment is waiver of statutory limitation applied under 18 USC 3006A(d)(3)): DATE: AMT. APPROVED: $

COUNSEL: ☒ IS A PRIVATE ATTORNEY; ☐ IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. 405-231-3371

VOUCHER NUMBER: 162965

Social Security No. 447-44-2015

ATTORNEY / ORGANIZATION / ADDRESS:

Mr. Chris E. Colston
Attorney at Law
1355 First National Center
Oklahoma City, Oklahoma

ZIP CODE 73102

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

Copy 2- Retained in court's files

APPENDIX A-1

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF

United States v. Jeffrey D. Cronic

FOR

Western District of Oklahoma

AT

Oklahoma City, Oklahoma

LOCATION NUMBER

96605

PROCEEDING (Cause or offense)

Private Investigator Services

1 ☒ Defendant — Adult
2 ☐ Defendant — Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Material Witness
7 ☐ Other (Specify below)

DOCKETED

DOCKET NUMBERS

Magistrate

District Court

CR-80-71-W

Court of Appeals

VOUCHER NUMBER

149008

PERSON REPRESENTED (Show full name & check 1 box)

Name already appears as ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 above

ATTORNEY'S STATEMENT

As the attorney for the person represented who is named above, I hereby affirm that (1) the services or expenditures described in the section to the right are necessary to an adequate legal representation or defense in this case and (2) the person represented affirms that he or she is unable to pay for the cost of these services. I therefore request authorization to obtain or incur them at the cost of the United States.

ATTORNEY'S SIGNATURE Date

SUCH SERVICES TO BE PROVIDED BY

NAME Dyland L. Dynes

TITLE OR ORGANIZATION Investigator

TELEPHONE NO. 405-235-3571

COURT ORDER

Financial eligibility of the person represented has been established to the court's satisfaction and authorization requested above is hereby granted.

Signature of Judge or Magistrate Date

SPECIAL AUTHORIZATIONS

APPORTION ___ % TRANSCRIPT COST WITH

Judge Initials

FINDINGS (e.g. pecuniary reimbursement, substantial question) IF REQUIRED BY 28 U.S.C. 752 HAVE BEEN ESTABLISHED

DAILY TRANSCRIPT APPROVED

☐ TRANSCRIPT ☐ INVESTIGATOR ☐ OTHER EXPERT (SEE BELOW)
☐ INTERPRETER ☐ PSYCHIATRIST

Name of attorney or equivalent or other presenting party | Kind of expert if "other"

Check category which box above and briefly describe below the service or expense and justifying reason for request. Receipt may be in separate statement signed by court

ESTIMATED COST

| | | FOR SERVICES | $ |
|---|---|---|---|
| | | FOR EXPENSES | $ |
| | | FOR TRANSCRIPT | $ |

TRANSCRIPT

| | No. Pages | Per Pg. | Computation | Amount Requested |
|---|---|---|---|---|
| ESTIMATED TRANSCRIPT COST ORIG. | | $ | $ | $ |
| COPIES | | $ | $ | $ |

*Exclude free copy for clerk of court

VOUCHER

**See instructions on page reverse

| | | | | |
|---|---|---|---|---|
| ACTUAL TRANSCRIPT COST ORIG. | | $ | $ | $ |
| COPIES | | $ | $ | $ |

FOR TRANSCRIPT $

SERVICES & EXPENSES

| | | |
|---|---|---|
| # | | |
| | SUB TOTALS | FOR SERVICES $ |
| | | FOR EXPENSES $ |

FILED

21 1980

HERBERT T. HOFF
CLERK, U. S. DISTRICT COURT

By Debbie Hoff
DEPUTY

TOTAL CLAIM

CERTIFICATIONS OF ATTORNEY

___ TRANSCRIPT WAS RECEIVED
___ I RECOMMEND PAYMENT TO DON TRACTOR OF AMOUNT CLAIMED
___ PAYMENT BECAUSE ACCEPTANCE OF ATTACHED CHECK OR RELEASE SIGNED IS PAID FOR TRANSCRIPT

Signature of Contractor Payee

$

AMOUNT CERTIFIED/APPROVED

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE MAGISTRATE

Date

$

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS

Payment in excess of statutory limitation approved under 8 USC 3006A(d)(3)

Date

AMT APPROVED $

# USE ADDITIONAL BLANK SHEETS IF MORE SPACE IS NEEDED

VOUCHER NUMBER 149008

Social Security No. 445-52-3590
Telephone No. 405-235-3571

PERSON OR ORGANIZATION

Dr. Dyland L. Dynes

ADDRESS

1309 First National Center West
Oklahoma City, OK ZIP CODE 73102

AT THE TIME OF AUTHORIZATION PLEASE TYPE OR PRINT CLEARLY THE NAME OF PERSON OR ORGANIZATION PROVIDING SERVICE (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

Copy 2 — Retained in Court's Files

APPENDIX A-2

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF

USA v. Cronic & Cummings

FOR

Western District of Okla.

AT

Oklahoma City, OK

LOCATION NUMBER: 36405

DOCKET NUMBERS: Magistrate: ; District Court: CR-80-21-E; Court of Appeals:

VOUCHER NUMBER: 149447

PROCEEDING (Attorney to check)

Motions, Hearing, Jury Trial

1 ☐ Defendant — Adult
2 ☐ Defendant — Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify below)

PERSON REPRESENTED (Show full name & mailing address)

Harrison P. Cronic & Carolyn S. Cummings

ATTORNEY'S STATEMENT

As the attorney for the person represented who is named above, I hereby affirm that the services or expenditures described in the items to the right are necessary to an adequate representation or defense in this case and that the person represented affirms that he or she is unable to pay for the cost of these services. I therefore request authorization to obtain or furnish them at the cost of the United States.

ATTORNEY'S SIGNATURE Date

SUCH SERVICES TO BE PROVIDED BY

NAME: Aubrey Crisp

TITLE OR ORGANIZATION: Court Reporter

TELEPHONE NO: 405-236-8426

COURT ORDER

Financial ability of the person represented to pay has been established to the court's satisfaction and authorization requested above is hereby granted.

Signature of Judge or Magistrate Date

SPECIAL AUTHORIZATIONS

AUTHORIZATION — % TRANSCRIPT COST — Judge's Initials

FINDINGS (As prescribed in 18 U.S.C. 3006A(e)) IF REQUIRED BY 18 U.S.C. 983 HAVE BEEN ESTABLISHED

ONLY TRANSCRIPT APPROVED

CERTIFICATIONS OF ATTORNEY

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TRANSCRIPT ☐ INVESTIGATOR ☐ OTHER EXPERT (BELOW) ☐ INTERPRETER ☐ PSYCHIATRIST

If transcript requested, of what proceeding — Kind of expert, if other

Motions, Hearing, Jury Trial

Check category within box above and in space below the service or expense and justifying reason for request. Reason may be in separate statement signed by court.

'Transcript of Jury Trial, Motions Sentencing, for purposes of appeal.

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# FEDERAL DEFENDERS OF SAN DIEGO, INC.

22 October 1983

Honorable Luther B. Eubanks, Chief Judge
United States District Court
Western District of Oklahoma
3301 Federal Courthouse Building
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

RE: United States v. Harrison P. Cronic
Supreme Court No. 82-660
District Court Cr. No. 80-21-E

Dear Judge Eubanks:

On behalf of the National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice I am preparing an amicus curiae brief in the above-entitled case on behalf of the respondent (defendant). The Clerk of the Supreme Court has granted counsel for the respondent until 9 November 1983 to file the brief. Since the issue of the competency of counsel appointed by the court is in issue, your assistance is sought in clarifying the record.

In 1965 the Western District of Oklahoma Plan under the Criminal Justice Act (CJA) provided for a panel of attorneys to be submitted by five county bar associations to accept appointments under the CJA. The panel would consist of lawyers who are familiar with the rudiments of criminal practice and procedure and provided that it would be composed of young lawyers, experienced lawyers, and lawyers who otherwise do not normally handle criminal cases, for "the responsibility of representing the defendants who are financially unable to obtain an adequate defense shall be a problem and duty of the bar as a whole, not just lawyers who are agreeable to an assignment with regard to accept such work."

Paragraph three of the revised Plan, approved 27 December 1976, provided:

> "APPOINTMENT PANEL - Private attorneys will be appointed by the judges and magistrates of this district from a panel of attorneys approved by the judges of this court. Judges will appoint attorneys from the top of the list. Magistrates will appoint attorneys from the bottom of the list. Periodically as necessary the panel will be republished by the judges of this court."

The Plan modified and approved on 30 December 1980 stated:

"APPOINTMENT PANEL - Private attorneys will be appointed by the judges and magistrates of this district from a panel of attorneys approved by the judges of this court. Said appointments shall be made on a rotational basis subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations. Periodically as necessary, the panel will be republished by the judges of this court."

Please advise if this is an accurate statement of the pertinent provisions for the appointment and selection of counsel under the CJA Plans for the Western District of Oklahoma.

It is my understanding that in 1980 at the time counsel was appointed for Mr. Cronic that there were approximately 1,000 attorneys on the list for the appointment of counsel. At the time of the appointment of Mr. Colston the court indicated that it had contacted appointed counsel by telephone and obtained his name from an alphabetical listing. I would like to obtain a copy of the complete list of attorneys from which his name was selected.

Your help is sought in ensuring that the Supreme Court gets a complete opportunity to assess the circumstances surrounding the appointment of counsel in this case.

Sincerely,

John J. Cleary

JOHN J. CLEARY
Executive Director

JJC:teh

cc: Hon. Ronald L. Howland
United States Magistrate
3013 U.S. Courthouse
Oklahoma City, Oklahoma 73102

John Pichter Depue, Esq.
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

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APPENDIX B